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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1096

FRANK NADALINE, JOSEPH NADALINE
and LAWRENCE LEROY SMITH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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In its brief in opposition, the government fails to respond to the issues raised in the petition. A brief analysis underscores the appropriateness of this case for certiorari.

1. The government's argument that concealment by a dishonest juror did not deprive petitioners of the impartial jury guaranteed by the Sixth Amendment because there was no showing of actual prejudice misses the point. As shown in the petition (pages 8-11), the real issue is whether the non-disclosure was material, thus obviating any need for such a showing.

Resting on the opinion below, the brief in opposition tacitly adopts the circuit court's reverse application of the

test utilized in other circuits. Thus, the Third Circuit[1] and the District of Columbia Circuit[2] hold that if the non-disclosure is material, prejudice is conclusively inferred. The court below, however, purporting to apply this standard, held that because the juror later denied bias[3] and because defense counsel also concealed the relationship, prejudice was not shown and *therefore* the non-disclosure was not material.

It is plain from the record that the non-disclosure was material: The attorney was disciplined by the District Court (R. 1390a) and the Court of Appeals below explicitly recognized that "both the juror and defense counsel should have disclosed" the relationship (8a).

It is plain, too, that the non-disclosure was material as a matter of law. As enunciated by this Court in *Clark* v. *United States,* 289 U. S. 1, 11 (1932), the relation between the court and a deceitful juror "is tainted in its origin; it is a mere pretense and sham." Accordingly, unless the District Court examining on the voir dire was engaged in a futile exercise, the juror's active and willful concealment was material. Hence, no showing of actual prejudice was required, and application by the court below of a standard in conflict with that applied in other circuits warrants the grant of certiorari.

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[1] *United States ex rel. Fletcher* v. *Cavell,* 287 F. 2d 792, *cert. denied,* 366 U. S. 944 (1961), and *United States ex rel. DeVita* v. *McCorkle,* 248 F. 2d 1, *cert. denied,* 355 U. S. 873 (1957).

[2] *Jackson* v. *United States,* 395 F. 2d 615 (1968).

[3] Plainly not a purifying or trustworthy event under *United States* v. *Clark,* 289 U. S. 1 (1932). Moreover, since an admission of bias would have subjected him to a contempt proceeding, the juror's testimony must be viewed with suspicion.

2. Arguing that the admission of Smith's prior invalid conviction was harmless error, the government ignores the holdings of *Burgett* v. *Texas,* 389 U.S. 109 (1967), *United States* v. *Tucker,* 404 U.S. 443 (1972), and *Loper* v. *Beto,* 405 U.S. 473 (1972): Introduction of a constitutionally defective prior conviction is *inherently* prejudicial.

The government attempts to distinguish *Burgett* and its progeny by contending that "the record showed [the conviction was] intended not to impeach Smith's credibility generally, but to rebut his specific statement on direct that he was not 'a violent person.'" (Brief in Opposition, p. 3). This contention, understandably, is not buttressed by any citation to the record, a fact which highlights the fallacies in the government's position.

First, the record is devoid of any indication of the purposes for which the invalid conviction was introduced. The jury was never instructed that it was to consider the conviction solely as simple contradiction of a single statement made by Smith, nor that it could not be considered as general impeachment of Smith's credibility, nor that it was not evidence of guilt of the instant charges, nor indeed that the conviction had not been admitted against all three defendants. If the conviction was in fact introduced for a limited purpose, that notion was never communicated to the jury.

Second, and perhaps even more significant, the prior conviction—for breaking and entering—had no rebuttal value in the context of Smith's testimony. Breaking and entering, a crime against property, not persons, is neither necessarily nor logically inconsistent with non-violence.[4]

[4] If Smith had testified on direct that he had never been convicted of a crime, the distinction noted—but not approved—in *Loper* (405 U.S. at 482, n. 11) might have some application here. Smith's direct testimony, however, included *no* statements concerning prior convictions.

Finally, the government's argument amounts to no more than the construction of what might have been a legitimate purpose for admission if the conviction had been *valid.* Fundamental to *Burgett, Tucker* and *Loper,* however, is the principle that such legitimacy does not overcome the renewed deprivation where the prior conviction is constitutionally defective.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, it is respectfully submitted that a petition for a writ of certiorari should be granted.

Respectfully submitted,

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